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Supreme Court, U.S.
FILED

011086 JAN 18 2002

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No. _____

IN THE

Supreme Court of the United States

QUINTEN X. JACKSON, PETITIONER

v.

LAMONT A. MORGAN, et al., RESPONDENTS.

On Petition For A Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an inmate establishes that correction officers used force maliciously and sadistically for the purpose of causing him harm, does the Eighth Amendment impose an additional burden on the inmate to prove a threshold level of injury in order to establish a claim for excessive force under 42 U.S.C. § 1983?

LIST OF PARTIES

The Petitioner before this Court is Quinten X. Jackson, a resident of the State of Maryland. Mr. Jackson no longer is incarcerated. The Respondents are Lieutenant Stanley Locklear, Lieutenant Maarufu Aulu, Sergeant Gregory Maddox, Sergeant Robert Hicks, Officer Lamont Morgan, Officer Kevin Fenton, and Officer Erik Nelson (the "Officers"), all of whom are correction officers at the Maryland Correctional Adjustment Center located in Baltimore, Maryland.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unreported opinion of the Fourth Circuit was entered on September 24, 2001. It is printed in the appendix to this petition ("App.") at 1a-30a.

The memorandum of decision of the United States District Court for the District of Maryland, *Grimm, J.* dated December 20, 2000 is unreported but is printed at App. 35a.

JURISDICTION

The Fourth Circuit entered judgment on September 24, 2001. App. 31a. On October 23, 2001, the Court of Appeals denied Petitioner's timely Petition for Panel Rehearing and for Rehearing En Banc. 51a. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' ruling denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII

United States Constitution, Amendment XIV

42 U.S.C. 1983 (1982)

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve a decade-long conflict among the circuits over whether a malicious and sadistic attack by prison guards upon an inmate may be deemed constitutionally insignificant if the attack does not inflict serious injury.

In 1994, Quinten Jackson was incarcerated in the Maryland Correctional Adjustment Center ("MCAC") for minor drug offenses, none of which involved violence. App. 3a. On January 11, 1994, while securely locked in his cell at the MCAC, Mr. Jackson was sprayed with twelve bursts of mace by the Respondent officers (the "Officers") donning riot gear and gas masks. App. 14a-15a, 35a. Mr. Jackson was subsequently shackled and taken to a sink in a medical office, where he was inadequately decontaminated from the mace (which covered one hundred percent of his body). App. 16a, 36a. While en route to the sink, Mr. Jackson, fully secured in chains and surrounded by eight officers, was assaulted by an officer from behind. App. 16a, 36a. Ultimately, the officers stripped Mr. Jackson down to his underwear and locked him in an isolation cell, in painfully tight shackles,[1] for forty-four hours. App. 16a-17a. The isolation cell was a barren and cold chamber with metal walls and a concrete floor. It had no toilet, bed, bedding or running water. App. 17a. The walls were encrusted with feces, as was a grate in the center of the chamber. App. 16a. It had no heat, and Mr. Jackson spent two days on the floor exposed to the January cold without clothing. App. 16a-17a.

[1] The shackles were three-piece mechanical restraints consisting of leg irons, a waist chain, handcuffs, that go through the waist chain, and a black box that covers the locking mechanism of the cuffs.

The Officers withheld food from Mr. Jackson for sixteen hours. App. 17a. Moreover, Mr. Jackson could not eat and was forced to urinate on himself because the shackles were applied so tightly that he could not sufficiently maneuver his arms. App. 17a. He was confined like this for two days.

On March 16, 1995, Mr. Jackson filed a § 1983 action in the United States District Court for the District of Maryland alleging that his Eighth Amendment right to be free from cruel and unusual punishment was violated when he was subjected to excessive force by the Officers at MCAC on January 11-13, 1994. The parties consented to a jury trial before a magistrate judge.

In the district court, Mr. Jackson presented evidence that he suffered significant pain and injury. Such evidence included:

- Expert opinion testimony that the decontamination of Mr. Jackson from twelve bursts of mace was wholly inadequate and resulted in an unnecessary extension of the duration of his pain and suffering (App. 17a, 21a-22a);

- Testimony by Mr. Jackson regarding the effect of mace on him while shackled in the isolation cell including: burning pain, swollen and running eyes, groin pain, burning sensations in his throat and difficulty breathing (App. 21a-22a);

- Testimony by Mr. Jackson that the restraints placed on him while in isolation were painfully tight, hurting every time he moved, for forty-

four hours (App. 21a-22a);

- Testimony by Mr. Jackson that he was forced to urinate on himself because the restraints had been applied so tightly after he was moved to the isolation chamber that he could not move his arms (App. 21a-22a);

- Testimony by Mr. Jackson that he was unable to eat or drink for the forty-four hours because of the restraints of his arm and instead had to try to open a bag of potato chips with his mouth and teeth, as if he were a captive animal (App. 21a-22a);

- Prison records confirming that no food or drink was offered to Mr. Jackson for over sixteen hours after he entered the isolation confinement (App. 21a-22a);

- An isolation cell record which established the absence of any in-cell medical treatment for the forty-four hour period (App. 21a-22a);

- Testimony by Mr. Jackson that he was forced to lay on the floor to try to keep warm, corroborated by a videotape of Officers stripping him down to his underwear and leaving him in the concrete chamber without blankets on a winter date (App. 21a-22a);

- A videotape of the barren isolation chamber without a bed, toilet, toilet paper, pillow, mattress, coupled with Mr. Jackson's testimony regarding the presence of the feces-covered grate, the apparent purpose of which was to

substitute for a toilet (App. 21a-22a);

- Expert testimony that Mr. Jackson's in-cell injury was greatly exacerbated by the conditions which existed in the isolation cell (App. 22a);

After receipt of this evidence, the Court instructed the jury that it could award nominal damages, such as one dollar, but only if it found "that the plaintiff is entitled to a verdict in accordance with these instructions, but [did] not find that the plaintiff has suffered substantial actual damages." App. 22a.

On September 29, 1999, the jury returned a verdict in favor of Mr. Jackson with regard to his incarceration in the isolation cell in full shackles from January 11 to January 13, 1994. The jury specifically found that Mr. Jackson's constitutional rights were violated by the use of excessive force by the Officers. Mr. Jackson was awarded one dollar in compensatory damages and $9,500 in punitive damages. On its own initiative, the jury requested permission from the Court and parties to read a statement they had unanimously prepared in conjunction with the verdict. The parties and the Court consented to the jury's request. After announcing the verdict, the foreperson addressed the Officers in open-court with the following statement:

> We the jury in the matter of Quinten X. Jackson v. CO III Harlee, et al.[.,] wish to enter the following statement into the record.
>
> We find that the conditions existing at the Maryland Correctional Adjustment Center, in particular, the isolation cell known as the "pink room" violates the [E]ighth [A]mendment rights of prisoner [sic] occupants. Specifically, we

> regard the conditions inflicted upon the prisoners [sic] of "a sort repugnant to the conscience of mankind." Although we find that some of the responsibility for the use of the pink room, to inflict cruel and unusual punishment, lays with the Officers, the higher levels of management including Cptn. Peguese, the Assistant Warden, the Warden and the Department of Corrections bare [sic] the major responsibility.
>
> We urge the cessation of the use of the 'pink room' while its conditions violate the [E]ighth [A]mendment.
>
> In the course of this trial, a gratuitous battery inflicted by Cpl. Fenton upon Quinten Jackson was revealed to this jury & the court. Although we do not find that it rises to a level that deprived Mr. Jackson of his constitutional rights, we as citizens find it abhorrent [sic]. We urge that appropriate disciplinary action should be taken against Cpl. Fenton & to those other officers who did not report and covered up for his egregious [sic] actions.

App. 37a-38a.

The Officers filed a post-trial motion for judgment as a matter of law on October 6, 1999, arguing that there was insufficient evidence to support the jury's conclusion that the confinement of Mr. Jackson in an isolation cell in three-piece restraints, after having been sprayed with pepper mace twelve times, was cruel and unusual punishment. On December 20, 1999, the trial judge, in a thorough opinion, affirmed the jury verdict, concluding that Mr. Jackson

established sufficient evidence that the Officers acted maliciously and sadistically. App. 42a. The court reasoned that the duration of Mr. Jackson's confinement in a barren isolation cell in three-piece restraints in only his underwear, during the winter, "was excessive and purposely punitive." App. 41a. The Court found this especially so when "coupled with the disabling effect of the 12 bursts of pepper spray, as well as the assault by one of the corrections officers on Mr. Jackson as he was being escorted to the medical facility, and the indifferent and obviously ineffective measures used to decontaminate Mr. Jackson from the effects of the pepper spray." App. 41a.

The trial judge also found that Mr. Jackson introduced "more than sufficient evidence to support a reasonable conclusion that Mr. Jackson suffered more than constitutionally negligible pain." App. 42a. Finally, the court upheld the jury verdict concluding that Mr. Jackson established an alternative basis for maintaining his Eighth Amendment excessive force claim by establishing, as the jury so concluded, that the force used was the type "repugnant to the conscience of mankind." App. 43a (citing *Norman v. Taylor*, 245 F.3d 1259, 1263 (4th Cir. 1994); *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992)).

The Officers appealed to the Fourth Circuit, arguing that, *inter alia*, the trial court erred in finding that there was sufficient evidence to support the jury's conclusion that the Officers' use of force upon Mr. Jackson constituted cruel and unusual punishment. A three-judge panel of the Fourth Circuit, in a 2-1 decision, reversed the jury's verdict. The majority's decision to reverse the jury verdict was based on the ground that Mr. Jackson failed to offer sufficient evidence that he suffered more than *de minimis* pain or injury in his excessive force claim. App. 11a-12a. In reaching its decision, the majority relied exclusively on its

earlier decision of *Norman v. Taylor*, 25 F.3d at 1262-63, for the proposition that *de minimis* injury is evidence of *de minimis* use of force. In that case, the Fourth Circuit had held, contrary to other circuits, that *de minimis* injury defeats a plaintiff's excessive force claim. *Id.* at 1263. The *Norman* court nonetheless recognized that a plaintiff need not show *de minimis* injury when the amount of force used is "of a sort repugnant to the conscience of mankind." *Id.* at 1263n.4. In this case, the majority failed to apply the "repugnancy" test established by *Norman* and instead determined as a matter of law that the Officers' misconduct could not be found "repugnant" – notwithstanding the jury's written finding. App. 8a (dismissing the jury's "comments" as "gratuitous"). The majority concluded that "given the firmly established law in *Norman*, we believe no reasonable jury could have found for Jackson" because his injuries were *de minimis*. App. 11a.

Unlike the majority, the dissent found that ample evidence supported the jury's conclusion that the Officers applied force maliciously and sadistically for the very purpose of causing harm (subjective component), that Mr. Jackson suffered more than *de minimis* injury (first test for the objective component), and that the force used was a sort repugnant to the conscience of mankind (second test of objective component). The dissent emphasized that the objective component of an excessive force claim is not nearly as demanding as the subjective component because "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident." App. 20a (citing *Hudson*, 503 U.S. at 7).

Applying these principles, the dissent identified no less than eight examples of evidence which "undoubtedly constitutes ample proof of an imposition of pain sufficient to

support the jury's verdict." App. 21a-22a, 24a. The dissent concluded that "despite the majority's efforts to recast the evidence, a reasonable jury could certainly have found that the evidence offered of forty-four hours of pain and inhuman treatment demonstrated an impermissible infliction of pain resulting in greater than *de minimis* injury." App. 24a. Finally, the dissent found that even if [it] agreed with the majority's conclusion that Jackson's prolonged confinement in the isolation cell did not cause him to suffer more than *de minimis* injury, the court would be "obligated to sustain the jury's verdict because the force used on Jackson was of a sort repugnant to the conscience of mankind." App. 24a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision in this case highlights a serious and significant split in the circuit courts regarding the amount of injury needed to claim excessive force under the Eighth Amendment. This Court should grant certiorari to determine the appropriate standard for determining whether an inmate has made an excessive force claim – an issue that will affect pending and future cases. Without further guidance from the Court, lower courts across the country will continue to struggle over whether an inmate must plead and prove more than *de minimis* pain or injury or may convince a jury that defendant's misconduct was repugnant to the conscience of mankind.

The conflict among the circuits has been widely recognized. Numerous decisions since *Hudson* have attempted to resolve the question, but neither consistency nor clarity has emerged. Without a clear and uniform test for federal courts to use in protecting Eighth Amendment rights, the scope of that protection will continue to vary from jurisdiction to jurisdiction. Such inconsistency surely is not proper under the Constitution and is not efficient for the

administration of justice. Thus, Petitioner respectfully asks the Court to close the loop left open by the lower courts and resolve their longstanding conflict over the proper test to protect the rights of inmates to be free from excessive force.

I. THIS COURT SHOULD RESOLVE THE LONGSTANDING CONFLICT AMONG THE CIRCUITS OVER THE APPROPRIATE TEST TO APPLY TO AN EXCESSIVE FORCE CLAIM BROUGHT UNDER § 1983.

A. Introduction.

Over the last decade, the circuit courts of appeal have sharply divided over the amount of injury needed to establish an Eighth Amendment claim of excessive force.

The First, Fourth and Fifth Circuits require an inmate to plead and prove a discrete threshold level of injury in order to prevail on an Eighth Amendment excessive force claim brought under 42 U.S.C. § 1983. In these circuits, the extent of an inmate's injury alone may be dispositive of an Eighth Amendment claim irrespective of whether a correction officer maliciously intended to harm an inmate.

The Second, Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, on the other hand, consider the extent of an inmate's injury as but one of several factors in the excessive force determination. In these circuits, the extent of injury is not dispositive of an Eighth Amendment claim but is evaluated as part of the determination of whether correction officers' use of force was in good-faith or maliciously intended to cause harm.

The Third and Fourth Circuits have expressly acknowledged their conflict over the proper interpretation of

this Court's decision in *Hudson v. McMillian*, 503 U.S. 1 (1992). *See Brooks v. Kyler*, 204 F.3d 102, 108 (3d Cir. 2000), *disagreeing with Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994). Petitioner, having already shown that the Officers used force maliciously and sadistically to cause harm and presented evidence of injury, clearly would satisfy the Third Circuit test. [2]

In *Hudson*, this Court reviewed a Fifth Circuit decision which had held that an inmate could not prevail on his Eighth Amendment claim, despite an affirmative finding of excessive force, because his injuries were not significant. 503 U.S. at 5. In reversing the Fifth Circuit's decision, this Court held that the use of excessive physical force against a prisoner constitutes cruel and unusual punishment under the Eighth Amendment even though an inmate does not suffer any "serious" or "significant" injury. *Id.* at 9. The Court reasoned that in an Eighth Amendment excessive force case "the core judicial inquiry . . . [is] whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 6. That

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[2] The Fourth Circuit panel majority disposed of this case based solely on the extent of the Petitioner's injuries and without any consideration of Respondents' conduct. App. 11a-12a. As the dissent pointed out, the evidence was clear that the Officers used force without any penalogical justification. *See* App. 25a-28a (Motz, J. dissenting) (discussing the evidence relating to the need to use force, the amount of force used, the threat reasonably perceived and efforts to temper the severity of a forceful response and concluding that the Respondents acted maliciously to cause harm). That evidence could sustain the jury verdict under the Second, Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuit standards and probably the Eighth Circuit as well. *See Foulk v. Charrier*, 262 F.3d 687, 700-02 (8th Cir. 2001) (upholding nominal damage award for an inmate who had been maced and rejecting argument that the award of nominal damages signified *de minimis* injury and therefore *de minimis* use of force).

inquiry entails an examination of several relevant factors,[3] including, but not limited to, the extent of an inmate's injury. *Id.* at 7-9 (citing *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

Hudson made clear that the absence of serious or significant *injury* does not end the excessive force inquiry. *Id.* Instead, the Court recognized that *de minimis* uses of *force* were not protected by the Eighth Amendment. *Id.* at 9-10 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates a prisoner's constitutional rights.")). Only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. *Id.* at 10.

Applying these principles, the *Hudson* Court concluded that the force used against the inmate was not *de minimis* and that the extent of the inmate's injuries did not provide a basis for dismissal of his §1983 claim. *Id.* at 10.

B. Conflict between the Fourth and Third Circuits

The Fourth and Third Circuit decisions exemplify this conflict among the circuits.[4]

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[3] The factors include: 1) the need for the application of force; 2) the relationship between that need and the amount of force used; 3) the threat reasonably perceived by the responsible officials; 4) any efforts made to temper the severity of a forceful response, and; 5) the extent of the injury suffered by the inmate. *Hudson*, 503 U.S. at 7 (citing *Whitley*, 475 U.S. at 321).

[4] The disagreement has also been marked by the Tenth Circuit, which has expressly rejected the Fifth Circuit's approach. *Compare Siglar v. Hightower*, 112 F.3d 191, 922-24 (5th Cir. 1997) (inmate must prove more than *de minimis* injury) *with Archuleta v. Marshall*, No. 00-2033,

In *Norman* and progeny, the Fourth Circuit has repeatedly interpreted *Hudson* to require an inmate to plead and prove more than *de minimis* pain or injury. *Norman*, 25 F.3d at 1262-64; App. 11a; *Taylor v. McDuffie*, 155 F.3d 479, 483-84 (4th Cir. 1998); *Riley v. Dorton*, 115 F.3d 1159, 1166-1167 (4th Cir. 1997); *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996).[5] *See also Marshall v. Odom*, 156 F. Supp. 2d 525, 530 (D. Md. 2001). The failure to do so mandates a conclusive presumption that *de minimis* force was used and warrants dismissal of the action. *Norman*, 25 F.3d at 1262-63; App. 6a-7a; *Taylor*, 155 F.3d at 483-84; *Marshall*, 156 F. Supp. 2d at 530.

The Fourth Circuit's decision rested on what it termed the "negative implications" of the following single passage in *Hudson*:

> The blows directed at *Hudson* . . . are not *de minimis* for Eighth Amendment purposes. The extent of *Hudson's* injuries thus provides no basis for dismissal[.]

Hudson, 503 U.S. at 10, *quoted by Norman*, 25 F.3d at 1262. According to *Norman*, these two sentences

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2000 WL 100524 (10th Cir. July 20, 2000) (expressly declining to follow *Siglar*'s requirement of more than *de minimis* injury).

[5] One Fourth Circuit decision has applied the broader balancing test. *See Stanley v. Hejirika*, 134 F.3d 629, 637 (4th Cir. 1998) (considering extent of inmate's injuries as one factor in determination of whether excessive force used). A district court opinion in the Fourth Circuit, *Watford v. Bruce*, 126 F. Supp. 2d 425, 426-27 (E.D. Va. 2001) has commented that *Norman*'s requirement of a threshold level of injury to state an Eighth Amendment claim is seemingly in conflict with *Hudson*).

negatively implied that *de minimis* injuries warrant dismissal as they are "conclusive evidence" of the use of *de minimis* force. *Id.* at 1262-3. The *Norman* court reasoned that "*Hudson* did not suggest, nor much less hold, that an excessive force claim cannot be defeated by evidence that the plaintiff's injury was *de minimis*." *Id.* *See* Troy J. Aramburung, *The Role of De Minimis Injury in the Excessive Force Determination: Taylor v. McDuffie and the Fourth Circuit Stand Alone*, 14 BYU J. Pub. L. 313, 317 (2000) (discussing the conflicting positions of the Circuits).

In *Brooks*, the Third Circuit adopted a contrary interpretation of *Hudson*. That is, there is no fixed quantum of injury necessary to establish an Eighth Amendment excessive force claim, and the extent of an inmate's injury is just one of several factors to consider in determining whether force was used in good-faith or maliciously. *Brooks*, 204 at 107-08. *Accord*, *Ruffin v. Taylor*, 166 F. Supp. 2d 999, 1005 (D. Del. 2001); *Concepcion v. Morton*, 125 F. Supp. 2d 111, 121-22 (D.N.J. 2000). According to the Third Circuit, the extent of an inmate's injuries alone is no basis for dismissal of an excessive force claim. *Brooks*, 204 F.3d at 108.

In *Brooks*, the district court had relied on the Fourth Circuit's decision in *Norman* to award correction officers summary judgment based solely on a finding of *de minimis* injuries. *See id.* at 105. On appeal, the Third Circuit rejected *Norman*'s interpretation of *Hudson*:

> We disagree. Although the *Norman* reading [of the *Hudson* passage] is plausible, drawing instruction from Supreme Court passages through the use of the negative pregnant is risky and unsatisfactory. We find the better reading of these sentences to be the more straightforward one, drawn from the general

> teaching of *Hudson*: i.e., the absence of significant resulting injury is not a per se reason for dismissing a claim based . . . [on excessive force]. Although the extent of an inmate's injury provides a means for assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows). . . . As we read the [*Hudson*] opinion, the Supreme Court is committed to an Eighth Amendment which protects against cruel and unusual force, not merely cruel and unusual *force* that results in sufficient *injury*.

Id. at 108 (emphasis in original). To hold otherwise, the Third Circuit stated, could result in a prisoner being constitutionally beaten for the sole purpose of causing pain as long as the blows were inflicted in a manner that resulted in *de minimis* injuries. *Id.* Thus, the Third Circuit rule is that there is no arbitrary quantum of injury[6] necessary to maintain an excessive force action. Instead, the extent of an inmate's injury is merely one of several relevant factors in the ultimate Eighth Amendment issue of whether force was

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[6] The *Brooks* court rejected any rigid classification or characterization of injury for the Eighth Amendment excessive force analysis:

> We have, throughout the opinion, used the language of *de minimis*, minor, and significant injury as if there were such categories, because the problem presented to us by the District Court, the Fourth Circuit's opinion in *Norman*, and defendants, required us to respond to their effort to make such delineations. However, we do not deem these differences constitutionally significant; rather, an essential aspect of our holding is that plaintiff's claim does not turn on these definitions.

Brooks, 204 F.3d at 109.

used in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm.[7]

C. Circuits in Accord with the Fourth Circuit's Requirement that an Inmate Prove "More Than *De Minimis* Pain or Injury" to Sustain an Excessive Force Claim Brought Under § 1983.

The Fifth and First Circuits are generally in accord with the Fourth Circuit's interpretation and application of *Hudson v. McMillian*. The Fifth Circuit imposes a burden on an inmate to plead and prove that he or she suffered more than *de minimis* injury, and the failure of an inmate to satisfy that threshold level of injury is dispositive of the excessive force action. *Gomez v. Chandler*, 163 F.3d 921, 922-24 (5th Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).[8] Similarly, the First Circuit, although stopping short of the conclusive presumption applied by the Fourth Circuit, has ruled that "merely superficial injury" permits a reliable inference that the accompanying force was not harmful

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[7] *See, e.g.*, *Concepcion*, 125 F. Supp. 2d at 122-23 (extent of injury is one of several factors in determining whether force was used in good-faith or maliciously); *Ruffin*, 166 F. Supp. 2d at 105-06 (denying summary judgment even though injuries were *de minimis*).

[8] Earlier Fifth Circuit decisions had declined to adopt *Norman* and used the broader test. *See Easton v. Holt*, 73 F.3d 600, 604 n.24 (5th Cir. 1996) (contrasting *Hudson* and *Norman* but declining to resolve the issue: "we express no opinion whether the objective component of an excessive force claim now requires, in addition to more than *de minimis* use of force, a threshold showing of some quantity of injury."); *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996) (although some injury is required, the extent of the injury is one factor that may suggest whether the use of force was excessive); *Valencia v. Wiggins*, 981 F.2d 1440, 1446-47 (5th Cir. 1993) (same); *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1993) (same).

under the Eighth Amendment, warranting dismissal of an inmate's claim as constitutionally *de minimis*. *Calabria v. Dubois*, No. 93-1742, 1994 WL 209938 *2 (1st Cir. May 24, 1994) (dismissing an inmate's excessive force claim for a bloody lip caused by a thrown object); *see generally*, *Dean v. City of Worcester*, 924 F.2d 364, 368-69 (1st Cir. 1991) (arrestee's minor physical injuries insufficient to support a finding that officer used excessive force under the Fourth Amendment).

D. Circuits in Accord with the Third Circuit's Holding that the Extent of Injury Is Not Dispositive of an Excessive Force Claim Brought Under § 1983.

Conversely, the Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits are in general agreement with the Third Circuit's interpretation and application of *Hudson*. Each of these circuits consider the extent of an inmate's injuries as but one of several factors in the determination of whether force was used in good faith or maliciously for the purpose of causing harm. For the Second Circuit, *see Griffin v. Crippen*, 193 F.3d 89, 91 (2d Cir. 1999); *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999); *Davidson v. Flynn*, 32 F.3d 27, 29 n.1 (2d Cir. 1994); *Romano v. Howarth*, 998 F.2d 101, 106 (2d Cir. 1993); *Gibeau v. Nellis*, 18 F.3d 107, 110 (2d Cir. 1993). For the Sixth Circuit, *see Moore v. Holbrook*, 2 F.3d 697, 701-02 (6th Cir. 1993). For the Seventh Circuit, *see Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001); *Dewalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 1999); *Lunsford v. Bennett*, 17 F.3d 1574, 1582 (7th Cir. 1994). For the Ninth Circuit, *see Baumer v. Hampton*, No. 00-55250, 2000 WL 1335565 * 1 (9th Cir. July 28, 2000); *Easely v. Pinnell*, No. 98-16536, 1999 WL 311390 *1 (9th Cir. May 10, 1999). For the Tenth Circuit, *see Northington v. Jackson*, 973 F.2d 1518, 1523-24 (10th Cir. 1992). For the

Eleventh Circuit, *see Skirth v. Thornton*, 267 F.3d 1251, 1260 (11th Cir. 2001); *Campbell v. Sikes*, 169 F.3d 1353, 1375 (11th Cir. 1999).[9]

In these circuits, the extent of an inmate's injury is not dispositive of an inmate's excessive force claim under the Eighth Amendment. *See, e.g., Moore*, 2 F.3d at 701-02 (district court properly dismissed inmate's action only after considering all excessive force factors and not just whether inmate's injury was *de minimis*); *Schwenk v. Hartford*, 204 F.3d 1187, 1196 n.6 (9th Cir. 2000) (no requirement that inmate show serious injury where assault lacked penalogical justification); *see also Archuleta v. Marshall*, No. 00-2033, 2000 WL 1005245 *1 (10th Cir. July 20, 2000) (extent of inmate's injuries not determinative of Eighth Amendment claim); *Griffin v. Crippen*, 193 F.3d 89, 91 (2d Cir. 1999) (reversing dismissal of excessive force action where dismissal was based solely on extent of injuries); *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999) (malicious use of force to cause harm is a *per se* violation of the Eighth Amendment whether or not significant injury is evident); *Davidson v. Flynn*, 32 F.3d 27, 29 n.1 (2d Cir. 1994) (extent of injury relevant to Eighth Amendment inquiry, but does not end it).

In sum, the need for guidance from this Court is

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[9] The Eighth Circuit's approach is more closely aligned with the Third Circuit's reasoning but does not fit neatly into either the Fourth or Third Circuit line of cases. In the Eighth Circuit, an inmate must prove an actual physical injury, but the extent of the pain is considered only in the context of whether force was used in good faith or maliciously. *Foulk*, 262 F.3d at 700-02; *Jones v. Shields*, 207 F.3d 491, 495 (8th Cir. 2000). Thus, like the Third Circuit, the Eighth Circuit does not consider *de minimis* injury conclusive evidence of *de minimis force*. *See Foulk*, 262 F.3d at 700-01.

evident. The circuits are evaluating similar claims using fundamentally different tests, which inevitably results in vastly different outcomes. This Court should clarify the law so that the constitutional right to be free from excessive force is uniformly protected throughout the nation.

E. The Fourth Circuit's Approach Conflicts with this Court's Decision in *Hudson*.

The Fourth Circuit's decision in this case is in direct conflict with this Court's decision in *Hudson*. It rests squarely on the extent of the injuries sustained by the Petitioner, which it found were *de minimis* as a matter of law. Relying on *Norman*, the court ignored the district court and the jury's determination that the Officers used force maliciously and sadistically for the very purpose of causing Petitioner harm. App. 7a ("Given the firmly established law in *Norman*, we believe that no reasonable jury could have found for Jackson.").

The Fourth Circuit's requirement that inmates prove more than *de minimis* injury to satisfy the objective component of the Eighth Amendment has been criticized by many, both within that circuit and outside, as a clear misreading of this Court's ruling in *Hudson*. *See Norman*, 25 F.3d 1264-66 (Hall, J., dissenting); *Taylor v. McDuffie*, 155 F.3d 479, 485 (4th Cir. 1998) (Murnaghan, J., dissenting) (*Norman* was "based on a patent misreading of *Hudson*" and represents "an unacceptable curtailment of an inmate's right to be free from the use of excessive force"); *Watford v. Bruce*, 126 F. Supp. 2d 425, 427 (E.D. Va. 2001) (*Norman* decision "seemingly in conflict with the Supreme Court's holding in *Hudson*"); Aramburung, 14 BYU J. Pub. L. at 314-18 (discussing *Norman* conflict with *Hudson*).

Hudson recognized that, regardless of the type of claim

brought under it, the Eighth Amendment generally contains both subjective (whether the officials acted with a culpable state of mind) and objective (whether the alleged wrongdoing was sufficiently harmful enough to establish a constitutional deprivation) components. *Hudson*, 503 U.S. at 7-8; *Wilson v. Seiter*, 501 U.S. 294, 298-303 (1991). In analyzing the objective component, *Hudson* distinguished between prisoner conditions of confinement and medical deprivation claims, on the one hand, and excessive force claims on the other. The former claims require evidence that the deprivation was "harmful enough," but the latter type of claim, which is at issue here, has no such requirement:

> In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, *contemporary standards of decency are always violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.* Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.

Hudson, 503 U.S. at 9 (citation omitted) (emphasis added). *See Brooks*, 204 F.3d at 108. As a consequence, the majority unequivocally mandated that the Eighth Amendment excessive force inquiry focus on the prison official's use of force and not the extent of injuries to the inmate:

> [W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry . . . [is]

> whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Hudson, 503 U.S. at 6-7.[10]

The Fourth Circuit's rule that *de minimis* injuries are "conclusive evidence" of *de minimis* force and therefore beyond Eighth Amendment recognition, *Norman*, 25 F.3d at 1262-63, contradicts *Hudson*, which recognized that the ultimate issue in an Eighth Amendment excessive force inquiry is whether the degree of force employed was justified under the circumstances. The Court explained in no uncertain terms that the degree of injury suffered by an inmate is but one of many relevant factors:

> [T]he extent of injury suffered by an inmate *is one factor* that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such a wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.' In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived

[10] Other opinions in *Hudson* clearly understood this interpretation. *See* 503 U.S. at 17 (Brennan, J., concurring) ("I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement that we reject today"); *id.* at 18 (Thomas, J., dissenting) ("The extent to which a prisoner is injured by the force – indeed whether he is injured at all – is in the Court's view irrelevant.").

> by the responsible officials,' and any 'efforts made to temper the severity of a forceful response.' *The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.*

Hudson, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321) (emphasis added). The Fourth Circuit rule thus directly contradicts *Hudson* by authorizing judicial disposal of an excessive force claim solely on the basis of the extent of an inmate's injuries. Nothing in *Hudson* intimates that the extent of injury is ever conclusive of whether excessive force was used. To the contrary, *Hudson* left open a clear avenue of relief for victims of diabolic or inhuman acts leaving *de minimis* injury. *See* Aramburung, 14 BYU J. Pub. L. at 324-25.

The Fourth Circuit's approach contradicts *Hudson*'s "core" Eighth Amendment inquiry by placing the focus upon the injury, rather than upon the unjustified use of force. *See Brooks*, 204 F.3d at 108. As a consequence of this misguided interpretation of *Hudson*, correction officers have *carte blanche* constitutional authority to dispense excessive or unjustified force on inmates so long as they are careful or fortunate enough to only leave behind minor traces of their force. *See Taylor*, 155 F.3d at 487 (Murnaghan, J., dissenting). The case at bar provides a textbook example of such a situation, epitomizing the type of egregious and disgraceful misconduct this Court sought to stifle in *Hudson* – protecting against diabolic or inhuman treatment.[11]

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[11] *See Hudson*, 503 U.S. at 13-14 (Brennan, J., concurring) (giving examples of excessive force inflicting something less than significant or serious injury); *Taylor*, 155 F.3d at 486-87 (same).

Without guidance from this Court, courts applying the "more than *de minimis* pain or injury" standard will continue to err. Review by this Court is therefore warranted to provide clear guidance to resolve an ongoing circuit conflict regarding the fundamental constitutional protection against excessive force.

F. The Fourth Circuit's De Facto Abrogation of Its "Repugnancy" Standard Further Conflicts With *Hudson*.

Perhaps the most distressing aspect of the majority's erroneous opinion is that it summarily dismissed, without any analysis or articulation of a new standard, the trial court and jury's determination that the pain inflicted on Jackson was "repugnant to the conscience of mankind." The "repugnancy" standard was adopted by the Fourth Circuit following this Court's recognition in *Hudson* that "there may be highly unusual circumstances in which a particular application of force will cause relatively little, or perhaps no, enduring injury, but nonetheless will result in an impermissible infliction of pain." *Hudson*, 503 U.S. at 9.

Norman adopted this second test of the objective component of the Eighth Amendment as a means of adhering to *Hudson*'s admonition that "contemporary standards of decency are always violated" when "prison officials maliciously and sadistically use force to cause harm" and its express ruling that the Eighth Amendment prohibits "diabolic or inhuman" physical punishment that inflicts "less than some arbitrary quantity of injury." *Id.* Following this teaching, the Fourth Circuit held in *Norman* that when the amount of force used is "of a sort repugnant to the conscience of mankind," the plaintiff need not show even *de minimis* injury. 25 F.3d at 1263.

As the dissent noted, the majority abrogated this test by engaging in its own factfinding and determining that the conduct in question was not reprehensible.[12] Thus, the majority opinion effectively overrides *Hudson*, standing for the proposition that, as a matter of law, it is consitutionally permissible to spray an inmate with 12 bursts of pepper spray, assault him while he was restrained, fail to cleanse the spray from his body, and confine him for 44 hours in a cold, barren, feces-incrusted room, without clothes, bedding, or toilet, shackled in painful three-point restraints applied so tightly that the inmate could neither feed himself nor urinate in human fashion. These facts readily justified the jury's finding of repugnancy. As the district court stated, the jury's analysis was well-reasoned and differentiated between wrongful and constitutionally impermissible conduct:

> The Jury did conclude that the force used against the Plaintiff was repugnant to mankind, as evidenced by the fact that after delivering their verdict, they took the extraordinary measure of reading a public statement regarding their feelings about the Defendants' conduct...
>
> This statement demonstrates that the Jury understood the type of action required to find that excessive force was used against the

[12] The dissent properly castigated the majority for rejecting Petitioner's evidence, including his testimony that the three-point shackles were applied so tightly and painfully that he could neither eat nor humanely relieve himself and instead had to urinate in his underwear. See App. 23a-24a. As the dissent points out, the majority brushed aside this evidence by mistakenly confusing the initial application of shackles (which, as shown on the videotape, was not excessively tight) with a further reshackling after Petitioner was placed in the isolation cell. *See* App. 23a, n3.

Plaintiff. The Jury's statement also revealed that they concluded that Corporal Fenton purposefully hit the Plaintiff in the head during this incident. The Jury's comments about this incident indicated that they concluded that this action met the subjective component of an excessive force claim but failed to meet the objective component because there was no evidence to establish that this unprovoked assault caused more than a "*de minimis*" injury. The Jury's statement establishes that they clearly understood and properly applied the two-part analysis for determining whether excessive force was used. They condemned the gratuitous and malicious application of force by Corporal Fenton against a then disorientated, incoherent, and completely restrained inmate, even as they recognized that it did not rise to the level of cruel and unusual punishment. Having dutifully discharged their responsibilities as jurors, they then spoke out as ordinary citizens, simply and sincerely. Against this backdrop, to suggest that the Jury did not properly weigh the evidence and follow the instruction of law is untenable.

As the dissent recognized:

[T]he jury stated unequivocally that it 'regard[ed] the conditions inflicted upon the prisoners [in the Pink Room] of a sort repugnant to the conscience of mankind.' Although the majority dismisses the jurors' statement as 'gratuitous,' *ante* at 7, surely these words, in conjunction with the jurors'

> modest damages award, signal that they carefully assessed the evidence presented and concluded, as they expressly stated, that the guards acted in a manner 'repugnant to the conscience of mankind.' I fear that, in its dismissal of the jury's words, the majority forgets that it is juries, and not courts, who are charged with expressing the conscience of the community.

By failing to apply the "repugnancy" standard to the shocking facts in this case, the Fourth Circuit has effectively gutted *Hudson's* admonition that certain "diabolic" or "inhuman" physical punishment shall be considered unconstitutional, regardless of injury. Perhaps, therefore, this Court's greatest fear in *Hudson* has been met. The Fourth Circuit has established a "null set" for its "repugnancy" standard. Accordingly, review by this Court is warranted to ensure that Constitutional protection against extreme force in *any* form is not lost.

CONCLUSION

The decision of the Fourth Circuit presents direct conflicts with other circuits and with decisions of this Court on an issue of grave and fundamental importance. For the stated above, the Court should grant a Writ of Certiorari.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUINTEN X. JACKSON,
Plaintiff-Appellee,

v.

LAMONT A. MORGAN, Correctional Officer; STANLEY LOCKLEAR, Lieutenant; GREGORY MADDOX, Sergeant; KEVEN FENTON, Corporal; ROBERT HICKS; MAARUFU AULU; ERIK NELSON,
Defendants-Appellants,

No. 00-6129

and

STEVEN HARLEE; HOWARD GRANT; RICHARD LANHAM; EUGENE NUTH; T. CARTER, Sergeant; R. PARKER, Corporal,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Paul W. Grimm, Magistrate Judge.
(CA-95-271-WMN)

Argued: April 5, 2001

Decided: September 24, 2001

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and Patrick Michael DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Reversed and remanded by unpublished opinion. Judge Duffy wrote the opinion, in which Chief Judge Wilkinson joined. Judge Motz wrote a dissenting opinion.

COUNSEL

ARGUED: Glenn William Bell, Assistant Attorney General, Baltimore, Maryland, for Appellants. Brian Alain Zemil, VENABLE, BAETJER & HOWARD, L.L.P., Towson, Maryland, for Appellee.
ON BRIEF: J. Joseph Curran, Jr., Attorney General of Maryland, Baltimore, Maryland, for Appellants. Mitchell Y. Mirviss, VENABLE, BAETJER & HOWARD, L.L.P., Towson, Maryland; Theodore F. Roberts, DANAHER, TEDFORD, LAGNESE & NEAL, P.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

DUFFY, District Judge:

Appellants Locklear, Maddox, Fenton, Hicks, Aulu,

Morgan, and Nelson appeal from a jury verdict in the amount of $1 actual damages and a total award of $9,500 punitive damages. Appellants argue, inter alia, the district court erred in denying their motion for judgment as a matter of law. For the reasons set forth below, we reverse.

I.

Jackson brought claims under 42 U.S.C. § 1983 against Appellants for excessive force violating his Eighth Amendment rights. Appellants worked at the Maryland Correctional Adjustment Center, where Jackson was incarcerated during the relevant times in this case. Appellants were the response team sent to Jackson's cell by the duty officer who had already decided to remove Jackson from his cell for an earlier disturbance and to place him in the isolation cell. Jackson alleged Appellants used excessive force January 11-13, 1994, in two instances: (1) Appellants' use of pepper spray inside Jackson's cell, and (2) Appellants' placement of Jackson into an isolation cell known as "the pink room" for two days wearing only underwear and in three-point mechanical restraints and after spraying him with pepper spray.

On January 11, 1994, Lieutenant Locklear responded to Jackson's cell as the Duty Lieutenant in charge of all housing on that particular shift. The shift commander had ordered Jackson removed from his cell and placed in an isolation cell because he had been causing a disturbance. Lieutenant Locklear attempted to carry out that order with authorization to use pepper spray if necessary.

Jackson refused to comply with removal procedures and the orders of Lieutenant Locklear. Pursuant to regulations, Lieutenant Locklear ordered Jackson to remove and deliver his clothing for inspection prior to opening Jackson's cell.

Also according to regulations, Appellants then began to videotape their actions. Jackson still failed to comply, and Lieutenant Locklear sprayed pepper gas into Jackson's cell. The pepper spray hit Jackson in his face and groin. After twelve bursts of pepper spray at three different times and after repeated orders to comply, Jackson complied with removal procedures.

After removal, Jackson was taken to the medical department for treatment. The registered nurse on duty washed his head under running water and allowed him to wipe his groin with wet paper towels. Jackson was in three-point restraints during his flushing of the pepper spray. The response team then escorted Jackson to the isolation cell. Jackson was provided clean underwear and left in three-point mechanical restraints.

The district court allowed two of Jackson's claims to be submitted to the jury. Those two claims were for the amount of pepper spray used by Lieutenant Locklear and for Jackson's placement in the isolation cell for two days. The district court gave the jury a verdict form containing eleven pages of special interrogatories to assist its determination. The jury returned a verdict for Appellants on Jackson's claim for the use of pepper spray on January 11, 1994, but the jury found against Appellants for Jackson's claim of excessive force for his stay in the isolation cell. The jury also found Jackson proved by a preponderance of the evidence, but not by clear and convincing evidence, Appellants acted with malice. The jury then awarded $1 actual damages and punitive damages against specific Appellants totaling $9,500. The district court denied Appellants' motion for judgment as a matter of law in a post-trial order.

II.

We review de novo a district court's legal determinations under a Rule 50(b) motion for judgment and determine questions of the sufficiency of the evidence on whether a reasonable jury, based upon the evidence presented, could have reached their verdict. *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 888 (4th Cir. 1992). The evidence is viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. We will not reweigh the evidence or judge credibility. *GSM Dealer Servs. Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994).

Appellants argue the district court erred in denying their motion for judgment as a matter of law because Jackson failed to establish the objective and subjective requirements of an excessive force claim. Specifically, Appellants argue that Jackson failed to establish they "acted with a sufficiently culpable state of mind and the deprivation suffered was not sufficiently serious." We agree.

The Eighth Amendment expressly prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. "It not only outlaws excessive sentences but also protects inmates from inhumane treatment and conditions while imprisoned." *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996); *see Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To succeed on any Eighth Amendment claim for cruel and unusual punishment, a prisoner must prove: (1) objectively the deprivation of a basic human need was sufficiently serious, and (2) subjectively the prison officials acted with a "sufficiently culpable state of mind." *Wilson*, 501 U.S. at 298; *Williams*, 77 F.3d at 761.

We are mindful that prison officials should be allowed latitude in taking preventive measures to maintain safety of the officers and medical workers. The Supreme Court has clearly recognized the danger of overstepping the boundaries of judicial review in this area:

> "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

Whitley v. Albers, 475 U.S. 312, 321-22 (1986) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

III.

The objective element of an excessive force claim requires more than a de minimis use of force. The Supreme Court has proscribed recovery based on de minimis force, unless that use of force is "repugnant to the conscience of mankind." *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (internal quotation marks omitted). De minimis injury is evidence of de minimis force. *Norman v. Taylor*, 25 F.3d 1259, 1262-63 (4th Cir. 1994). This Court en banc has recognized a bright-line rule in the Supreme Court's jurisprudence that de minimis injury defeats a plaintiff's

excessive force claim "absent the most extraordinary circumstances," i.e., unless the force used was "repugnant to the conscience of mankind." *Id.* at 1263.

In *Norman* the district court granted summary judgment against the plaintiff. Although this case presents a different procedural posture, we must also look at the facts in the light most favorable to the plaintiff and make all reasonable inferences in his favor. Given the firmly established law in *Norman*, we believe no reasonable jury could have found for Jackson.

The district court's order denying Appellants' motion for judgment as a matter of law gave several justifications for the decision. The district court relied on testimony about the pain and disability caused by the pepper spray from Jackson. The district court found the medical treatment to relieve the effects of the pepper spray was insufficient given the amount of pepper spray used and the length of his confinement in the isolation room.[1] The district court also found that Jackson's claim was supported by evidence that the force used by appellants was "repugnant to mankind" and therefore satisfied Jackson's burden of proof even if his injury was de minimis. However, the court pointed only to the jury's "statement regarding their feelings about the Defendants' conduct."

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[1]Despite the alleged pain and disability, two minutes after exiting his cell--at 2:05 p.m. on the video tape--Jackson was shouting in Officer Fenton's face, calling him a devil, and "speaking in tongues." By 2:10 p.m. on the video tape, Jackson had washed his face and head eight times; the nurse had cleaned his head three times; and he exhibited no effects of the pepper spray. In fact, Jackson limited his decontamination and can be heard on the video tape telling the nurse, "That's alright." Jackson was then provided wet paper towels with which to wash his groin, and he cleaned his groin several times.

The jury added to the verdict form two handwritten pages admonishing Appellants and Maryland Department of Corrections for conditions of the isolation room and urging punishment for Appellant Fenton who they thought had struck Jackson without provocation during the transfer of Jackson from his cell to the isolation cell.[2] Most of the jury's statement was directed at the conditions in the isolation cell. We recognize that this court has condemned cell conditions similar, though admittedly more severe, than those of the isolation cell used in this case. See *Kirby v. Blackledge*, 530 F.2d 583, 586-87 (4th Cir. 1976) (identifying conditions that "taken alone reach the level of cruel and unusual punishment" and describing a strip cell that has "no bedding, no light, and no toilet, save a hole in the floor"). The jury in this case came to the same conclusion about the conditions of the isolation cell, but their comments were gratuitous.

This appeal involves a claim for excessive force and facts, such as the use of pepper spray and placement in an isolation cell in three-point restraints, that are not being reviewed for the first time. Taking the evidence in the light most favorable to Jackson, no reasonable jury could find the force used in this case was "repugnant to the conscience of mankind." Therefore, the propriety of sending this case to the jury depends on a showing of sufficient evidence for a

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[2]This apparent act by Officer Fenton has been described as a blow. A blow is a sudden hard hit, as with a fist; an unexpected shock. The tape does not disclose any blow. During Jackson's transfer to the medical department, Officer Fenton can be seen making a gesture or swipe in the air when Jackson was turned around toward Officer Fenton and chanting in his face. No contact can be seen on the video tape. If there was any contact at all, then Jackson did not so much as blink. He did not flinch, recoil, react, or cry out. Jackson continued unabated shouting over his shoulder in Officer Fenton's face. Forceful contact, if any, must be assumed from the video tape. In any event, any possible injury to Jackson was de minimis.

reasonable jury to find Jackson suffered more than de minimis injury. *See Norman v. Taylor*, 25 F.2d at 1263.

The jury's verdict included $1 actual damages which could be construed as a finding of de minimis injury to Jackson. However, the jury instructions, provided upon request of the Court after oral arguments, reveal the jury was instructed: "If you find that the plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the plaintiff has suffered *substantial* actual damages, then you may return a verdict for the plaintiff in some nominal sum such as one dollar." (J.I. 30, emphasis added.) The instructions also provided: "You may not, however, compensate a plaintiff who has not suffered any actual pain or injury *which is more than de minimis* as a result of the unconstitutional conduct." (J.I. 26, emphasis added.) We recognize the jury's verdict of $1 actual damages reflects their view that Jackson suffered more than de minimus injury but less than substantial injury. However, in reviewing a district court's denial of a motion for judgment as a matter of law, we do not defer to the jury's verdict. Rather, we must review the district court's decision on the motion.

The district court erred in relying on this court's decision in *Williams* to support the denial of Appellants' motion for judgment as a matter of law. *Williams* does not control disposition of this case. Several material facts distinguish this case and warrant reversal. First, *Williams* discussed only the subjective element of the excessive force claim and did not address the objective element because the officers conceded Williams had met his burden on that issue. Second, the chemical spray in *Williams* was CS tear gas, the type used by military and discontinued prior to 1994 by Maryland Department of Corrections. *See Williams*, 77 F.3d at 764 (recognizing CS tear gas as potentially lethal). Appellants used OC pepper spray on Jackson. The experts in

this case testified to the differences between CS tear gas and OC pepper spray, not the least of which was the timing and appropriateness of using the two different sprays as a use of force. Pepper spray is a milder irritant and is employed to avoid physical confrontation among inmates and guards; whereas CS tear gas was used primarily as a weapon with greater consequences and required more thorough decontamination.

Third, the greater effects and severity of damage caused by CS tear gas than by OC pepper spray directly affects the necessary medical treatment after exposure and prior to being placed in isolation. Appellants' expert in this case testified that the effects of OC pepper spray did not last more than an hour and had no known permanent effects. Williams received no medical treatment following the use of the more potent CS tear gas against him. Jackson's treatment and decontamination was documented on the videotape and included flushing his face and head with running water and wiping his groin with wet paper towels. Jackson's decontamination was adequate, and Jackson did not complain to the nurse or the officers.

The notes of the registered nurse who treated Jackson on January 11, 1994, showed Jackson had no complaints that day. In addition, the videotape showed Jackson's recovery from the effects of the pepper spray. Jackson submitted no medical testimony that the OC pepper spray had any lasting effect or aggravated an existing condition. Jackson's own testimony revealed his allegations were not supported by any complaints to the medical department. Jackson made no complaints of any kind until January 27, more than two weeks after he was sprayed with pepper spray, and even then none of his complaints referenced the January 11-13, 1994, incident.

Fourth, the type of restraints and effect on the inmate in those restraints was substantially more severe in *Williams* even though Williams stayed in the restraints only eight hours. The four-point mechanical restraints prevented Williams from eating and required him to urinate on himself. Jackson argues his three-point restraints were too tight and caused him constant pain during the time he was in the isolation cell. Jackson also claims the restraints prevented him from eating and properly urinating in the isolation cell.

The three-point restraints did not totally prevent either activity for Jackson though his movement was restricted. The videotape showed Jackson used his hands to wipe his face and groin area wearing the same restraints in which he was placed in the isolation cell. The record of isolation confinement shows all meals were at least offered to Jackson during confinement in the isolation cell and that Jackson refused breakfast and lunch on January 12, 1994. Jackson's testimony does not dispute this. Jackson made no complaints of these allegations even though he knew how to make complaints and had done so before, and the record of confinement reveals no complaints or discussion with Jackson while he was in the isolation cell.

Jackson has not shown more than de minimis injury. Taking the evidence in the light most favorable to Jackson and making all reasonable inferences in his favor, we believe no reasonable jury could find excessive force was used. Therefore, the district court should have granted Appellants' motion for judgment as a matter of law, and we reverse.

IV.

Because this Court reverses the district court's ruling on Appellants' motion for judgment, we do not reach the questions presented on the subjective element of an excessive force claim, qualified immunity, and punitive damages.

CONCLUSION

For the reasons stated herein, we reverse Jackson's jury verdict against Appellants and remand to the district court with direction to enter judgment for the Appellants in accordance with Rule 50(b) of the Federal Rules of Civil Procedure and this opinion. *See Mutual Life Ins. Co. of N.Y. v. Asbell*, 163 F.2d 121, 123 (4th Cir. 1947).

REVERSED AND REMANDED

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The Eighth Amendment outlaws the unnecessary infliction of pain, even on convicted felons. Quentin [sic] Jackson presented ample evidence from which the jury could conclude, as it did, that correctional officers maliciously and sadistically used excessive force to inflict unnecessary and wanton pain on him, in clear violation of the Eighth Amendment. The jury's award to Jackson of one dollar in actual damages and $9,500 in punitive damages is a measured and entirely appropriate response to the evidence presented at trial. Accordingly, I would affirm the jury verdict and must respectfully dissent from the majority's refusal to do so.

I.

The facts giving rise to this lawsuit occurred on January 11, 1994, during a routine "shakedown," (body and cell search) at the Maryland Correctional Adjustment Center (MCAC). At trial, the parties offered conflicting testimony as to what transpired during this search. In light of the jury verdict in favor of Jackson, we are required to view the facts in the light most favorable to him. *See* Fed. R. Civ. P. 50(a). Nevertheless, in order to set forth all of the legal issues involved, I also include the officers' version of the facts.

Jackson testified that, while he was unclothed, Officer Morgan ordered him to turn in circles repeatedly, not just once or twice as is normal in a shakedown. Jackson objected to this perceived harassment, calling Officer Morgan a homosexual. Jackson stated that, despite this harassment, he permitted the officers to continue the search, and then, when they were finished, he asked to see the officers' superior so that he could voice his concerns and obtain the appropriate form to make a written complaint to the Warden. A few minutes later, according to Jackson's testimony, instead of the officers' superior, a Response Team arrived wearing riot gear and gas masks to extract Jackson from his cell.

The officers testified, to the contrary, that Jackson refused to leave his cell during the shakedown, thereby preventing them from searching it. Although the officers acknowledged that they ultimately persuaded Jackson to vacate his cell so that it could be searched, they maintained that Jackson created a disturbance in the cell block by yelling obscenities and banging on the walls. According to the officers, when they informed Jackson that he would be placed in an isolation cell for creating a disturbance, he refused to comply with the ordinary removal procedures. For this reason, they assembled a six-person Response Team

to transport Jackson to the isolation cell known as the Pink Room to "cool down."

Jackson maintains that he created no disturbance necessitating removal from his cell to "cool down." When the Response Team arrived at his cell, Jackson testified that he was sitting quietly on his bunk reading. Jackson's account, rather than the officers' was apparently credited at a subsequent prison disciplinary hearing, in which Jackson was found *not* guilty of creating a cellblock disturbance.

Many of the remaining relevant facts are clearly documented in the Response Team's videotape, which begins with the Team's arrival at Jackson's cell. The tape starts at 1:54 p.m. with an introduction and identification of the Response Team. The tape shows only the outside of Jackson's cell, from which point Jackson cannot be seen, but no disturbance can be heard.

The videotape reveals that, at 1:56 p.m., Officer Locklear orders Jackson to pass his clothes out and to place his hands in the feed slot to be cuffed. Jackson responds by stating that he had just been searched, and asks the purpose of the officers' request. Locklear then sprays two bursts of pepper spray into Jackson's cell.[1] Jackson testified, without contradiction, that the first burst of pepper spray struck him

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[1]Jackson introduced the following uncontroverted evidence as to the pepper spray the officers used against him. The spray consisted of ninety percent Freon-based chemical, which acted as a propellant, and ten percent Oleo Resin Capsicum, which is derived from the hot oil and waxes of the cayenne pepper. This chemical takes effect upon contact with skin and mucous membranes and causes a painful, burning sensation, inflammation of the mucous membranes in the eyes, nose and throat, skin inflammation, coughing or gagging if inhaled and an involuntary closing of the eyes. The physical effects of the spray are accompanied by psychological effects, including fear, disorientation, anxiety and panic.

in the groin, causing a painful burning sensation, and the second burst struck him in the face, causing him to cry out in pain. Jackson stated that he felt like his body was burning and he began to choke and gag from inhalation of the pepper spray. His eyes swelled shut and he was unable to breathe. Due to the pain he was experiencing, Jackson maintains that he became confused and disoriented, and was unable to understand the orders the Response Team directed to him.

At 1:58 p.m., two minutes after the first bursts of pepper spray, Jackson has still not complied with the Response Team's orders; Locklear sprays four additional bursts of pepper spray into Jackson's cell. At 1:59 p.m., Jackson passes his jumpsuit through the feed slot to the officers. Locklear then orders Jackson to send out the rest of his clothes as well. At 2:00 p.m., Locklear sprays an additional burst of pepper spray, this one lasting a full six seconds. The videotape reveals that this burst of pepper spray causes Jackson to cough and gag. At 2:01 p.m., Jackson passes his underwear and shoes through the feed slot. Nevertheless, at 2:02 p.m., the administration of five additional bursts of pepper spray can be heard. At trial, Officer Maddox acknowledged that, at that point, he had gone around to the back of Jackson's cell and sprayed into Jackson's cell through the window, which was covered by a mesh screen.

At 2:03 p.m., Jackson places his hands in the feed slot to be hand-cuffed, and exits his cell wearing a jumpsuit. The tape reveals that Jackson is in obvious pain; he gasps for air and rubs his teary eyes. At 2:04 p.m., the Response Team leads Jackson to the infirmary. Jackson has difficulty walking and, at one point, falls down. At 2:05 p.m., while walking to the infirmary, Jackson begins babbling incoherently. (Jackson testified that at this time he was "speaking in tongues" and praying to God.) At 2:06 p.m., shortly after going through a doorway, Jackson testified that

Officer Fenton struck him in the back of the head. Although Officer Fenton denied striking Jackson, the blow can be seen on the videotape.

At 2:07 p.m., the officers take Jackson to the nurse. The officers permit him to rinse his head in a sink for several minutes and to rub his genitals with a wet paper towel. In addition, the nurse rubs Jackson's face with a paper towel. This is the only medical treatment that the officers provided Jackson before confining him to the Pink Room isolation cell.

From 2:12 p.m. to 2:19 p.m., the Response Team prepares Jackson for placement in the Pink Room. During this period the Team removes Jackson's shackles and orders Jackson to remove his jumpsuit and underwear. After several minutes, during which time Jackson is naked, the officers provide him with clean underpants, but nothing else. The officers then re-shackle Jackson and place him in the isolation cell, clothed only in his underwear. The videotape record of the entire preparation period shows Jackson remaining calm throughout. Department of Corrections (DOC) regulations state that prison officials can place in-cell shackles on an inmate *only* when he presents a serious threat of violence.

Although it is no longer in use, at the time of this incident, the Pink Room was a bare cell approximately ten feet by ten feet with metal walls, a concrete floor and no furniture. It lacked a toilet, and instead had a hole in the floor, covered by a grate, which, during Jackson's confinement, was encrusted with feces and blood.

Jackson testified that the shackles placed on him throughout his confinement in the Pink Room were so tight that he could not move his hands, and so he could not even

remove his underwear to urinate. Although it was very cold in the Pink Room and Jackson was clad only in underwear, the officers provided him with no bedding or clothes. In addition to the cold and the painful shackles, Jackson testified that he was in continual pain due to the effects of the pepper spray during the entire period of his confinement in the Pink Room.

According to the logs of Jackson's confinement, although he was awake and alert, the officers did not provide him with any food for sixteen hours. When he was finally provided with food, during the seventeenth hour of his confinement, Jackson testified that the shackles prevented him from eating. The logs record that Jackson remained calm for the first seventeen hours he was imprisoned in the Pink Room. Nevertheless, his confinement there continued for nearly forty-five hours.

Captain Jeffrey Wells, a DOC employee, testified at trial as an expert witness for the officers. Wells stated his opinion that this case presented a need to use force and to remove Jackson from his cell. He also opined that the use of twelve bursts of pepper spray was an appropriate amount of force. He agreed that in-cell restraints should never be used as a form of punishment but only as a "management tool" to control an inmate while the inmate was in an isolation cell.

Vincent Nathan, a lawyer specializing in prison law, testified as an expert for Jackson. Nathan noted that Jackson was not creating a disturbance or threatening anyone at the time the Response Team forcibly extracted him from his cell, and so there was no need to relocate him. Nathan also noted that the correctional officers made no attempt to use non-forceful means to resolve the situation. Nathan further testified that the prison officials did not sufficiently decontaminate Jackson from the pepper spray. All of the

exposed areas of Jackson's body should have been flushed with water and washed with soap after the incident. (Although the prison's protocol also required that all exposed areas of an inmate's body be flushed with water, the officers only permitted Jackson to rinse his head and genitals with water for a short time.) Given these facts, Nathan opined that the Pink Room confinement of Jackson constituted a grossly excessive use of force.

II.

In March 1995, Jackson initiated this action, alleging that the MCAC officers' use of excessive force on January 11-13, 1994, violated his Eighth Amendment right to be free from cruel and unusual punishment. With the parties' consent, Magistrate Judge Paul W. Grimm presided over a jury trial on Jackson's claims. The jury found for the correctional officers on Jackson's claim that use of the pepper spray in itself constituted excessive force, but found for Jackson on his claim that the officers used excessive force in confining him in three-point restraints in the manner they did for almost two days.[2] The jury awarded Jackson one dollar in compensatory damages and $9,500 in punitive damages.

The jurors also requested that the following statement be read into the record:

> We find that the conditions existing at the Maryland Correctional Adjustment Center, in

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[2] Jackson also alleged that he was placed in an isolation cell without due process of law. Judge Grimm granted the officers' motion for judgment as a matter of law on Jackson's Fourteenth Amendment due process claim on qualified immunity grounds, concluding that there was no clearly established constitutional right to a pre-deprivation hearing prior to placement of an inmate in the isolation cell. Jackson does not appeal that ruling.

> particular, the isolation cell known as the "pink room" violate the eighth amendment rights of prison occupants. Specifically we regard the conditions inflicted upon the prisoners of "a sort repugnant to the conscience of mankind.". . . We urge the cessation of the use of the "pink room" while its conditions violate the eighth amendment.

Judge Grimm denied the officers' post-trial motion for judgment as a matter of law, and the officers appealed to this court.

As the majority recognizes, although we review de novo a district court's legal determinations, a jury's factual finding must be affirmed unless there is "no legally sufficient evidentiary basis for a reasonable jury" to so find. Fed. R. Civ. P. 50(b). Indeed, reviewing courts "owe great deference to the jury's view of the evidence." *Newman v. Holmes*,122 F.3d 650, 653 (8th Cir. 1997) (affirming jury verdict for prisoner where question of whether guard was deliberately indifferent was "very close"). Moreover, we, as an appellate court, cannot reweigh the evidence or judge credibility, but rather must view the evidence in the light most favorable to Jackson as the prevailing party.

III.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. Undeniably, the "unnecessary and wanton infliction of pain," constitutes cruel and unusual punishment forbidden by the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

To determine whether a prison official has violated the Eighth Amendment, courts must analyze both subjective and objective components. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Specifically, this analysis requires "inquiry as to whether the prison official acted with a sufficiently culpable state of mind (subjective component) and whether the deprivation suffered or injury inflicted on the inmate was sufficiently serious (objective component)." *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). "What is necessary to establish an unnecessary and wanton infliction of pain" with regard to each component "varies according to the nature of the alleged constitutional violation." Hudson, 503 U.S. at 5 (internal quotation marks omitted).

In an excessive force case, a claimant must meet a heavy burden to satisfy the subjective component of the claim; specifically, he must prove that correctional officers applied force "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. The objective component of an excessive force claim is not nearly as demanding, however, because "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident." *Hudson*, 503 U.S. at 9. With these principles in mind, I turn to the facts of this case.

IV.

The majority rests its decision to reverse the jury verdict solely on the ground that Jackson failed to offer sufficient evidence to satisfy the objective component of his excessive force claim. Accordingly, I begin with an analysis of that component.

To establish the objective component of an excessive force claim, generally a plaintiff must simply prove that he suffered more than de minimis injury. *Id.* at 9-10. However, if "a particular application of force . . . cause[s] relatively little, or perhaps no, enduring injury, but nonetheless . . . result[s] in an impermissible infliction of pain," the pain itself "will be such that it can properly be said to constitute more than de minimis injury." *Norman v. Taylor*, 25 F. 3d 1259, 1263 n.4 (4th Cir. 1994). Moreover, when the amount of force used is "of a sort repugnant to the conscience of mankind," the plaintiff need not show even de minimis injury to satisfy the objective component. *Id.* In such a case, even if the plaintiff suffered *no* lasting injury, he can prevail on the objective component of an excessive force claim. Jackson offered the following evidence in support of the objective component of his claim:

- The officers sprayed his cell with pepper spray twelve times.

- Pepper spray causes pain, burning, inflammation of the mucous membranes in the eyes, nose and throat, skin inflammation, induces coughing or gagging and causes the eyes to close involuntarily. The spray also produces psychological effects, such as fear, disorientation, anxiety and panic.

- Jackson did not receive any medical treatment after being exposed to the pepper spray. Satisfactory decontamination from the effects of pepper spray requires one to flush *all* affected areas with water and wash them with soap. The officers' only attempt at decontamination was limited to giving Jackson a few minutes to rinse his face and groin area with water.

- After removing him from his cell, the officers locked

Jackson in an isolation cell, known as the Pink Room, for forty-four hours.

- The Pink Room was a bare cell approximately ten feet by ten feet with metal walls, a concrete floor and no furniture. It lacked a toilet, and instead had a grate in the floor encrusted with feces and blood.

- Although it was January, Jackson was not provided with any bedding, clothing -- save a single pair of underpants -- or other means of staying warm.

- The officers withheld food from Jackson for sixteen hours.

- During his confinement, Jackson was forced to wear excessively tight three-point restraints which caused him pain when he moved and prevented him from eating and removing his clothes to urinate.

After receipt of this evidence, Judge Grimm instructed the jury that it could award nominal damages, such as one dollar, but only if it found "that the plaintiff is entitled to a verdict in accordance with these instructions, but [did] not find that the plaintiff has suffered substantial actual damages." *See ante* at 7 (quoting jury instructions). The officers do not offer any objection to the jury instructions, nor could they since the instructions are clearly proper. Thus, a properly instructed jury awarded Jackson one dollar in nominal damages and $9,500 in punitive damages. Even the majority acknowledges that this award reflects the jury's clear finding that Jackson had suffered more than de minimis injury. *See ante* at 7.

In rejecting this finding, the majority relies on the distinctions between this case and *Williams v. Benjamin*, 77

F.3d 756 (4th Cir. 1996). *See ante* at 7-9. The majority contends that Jackson did not suffer more than de minimis injury in the form of an impermissible infliction of pain because (i) pepper spray is a milder irritant than the tear gas used in *Williams*, (ii) exposure to pepper spray does not necessitate medical treatment as does tear gas, nor does it have any permanent effect and (iii) the four-point restraints used in Williams were more restrictive than the three-point restraints used here. *See ante* at 7-9.

Cases seldom present identical facts, and the facts in this case obviously are not identical to those in *Williams*; however, I believe that in significant respects the facts here evidence a more, not less, egregious infliction of unnecessary pain. Although pepper spray may be a milder irritant than tear gas, Vincent Nathan, Jackson's expert, testified that exposure to pepper spray causes painful burning in the eyes, nose, and throat, swelling, skin irritation and coughing or gagging, as well as psychological trauma, including fear, disorientation, anxiety and panic. Jackson's testimony confirmed that he experienced all of these effects, and that he was not properly decontaminated after his exposure to pepper spray -- a fact which MCAC's own regulations confirm. Moreover, while Jackson was bound in three-point restraints, as opposed to the four-point type used on Williams, Jackson was confined in the painfully tight restraints and prevented from using his hands to feed himself or assist in urination for forty-four hours -- almost six times as long as Williams's confinement.[3]

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[3]The majority concludes that the three-point restraints could not have totally prevented Jackson from using his hands because he was wearing three-point restraints when he used his hands to flush his face and groin with water in the infirmary. *See ante* at 9. However, between Jackson's visit to the infirmary and his confinement in the Pink Room, Jackson's shackles were removed to permit him to change his underwear and he was then re-shackled before being placed in the Pink Room. Thus, the

Even if this were not a stronger case than *Williams*, the evidence summarized above undoubtedly constitutes ample proof of an imposition of pain sufficient to support the jury's verdict. Despite the majority's efforts to recast the evidence, a reasonable jury could certainly have found that the evidence offered of forty-four hours of pain and inhumane treatment demonstrated "an impermissible infliction of pain" resulting in greater than de minimis injury. *Norman*, 25 F.3d at 1263 n.4.

Moreover, even if I agreed with the majority's conclusion that Jackson's prolonged confinement in the Pink Room did not cause him to suffer an impermissible amount of pain constituting more than de minimis injury, we would nonetheless be obligated to sustain the jury's verdict because the record reveals abundant evidence that the force used on Jackson was of the sort "repugnant to the conscience of mankind." *Id.* Where the amount of force used rises to this level, a claimant need not show even de minimis injury to satisfy the objective element of an excessive force claim. *See Id.*

In the instant case, the jury not only found for Jackson on his excessive force claim arising from his confinement in the Pink Room, it also took the "extraordinary measure" of requesting that a statement be read into the record expressing its disapproval of the guards' treatment of Jackson. In this statement, the jury stated unequivocally that it "regard[ed] the conditions inflicted upon the prisoners [in the Pink

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fact that he could move his hands while in the infirmary does not mean that he could move them equally well when confined in the Pink Room because the shackles could have been placed on Jackson more tightly the second time. In any event, we are required to credit Jackson's testimony that, during his time in isolation confinement, he could not move his hands to remove his underwear or to eat.

Room] of a sort repugnant to the conscience of mankind." Although the majority dismisses the jurors' statement as "gratuitous," *ante* at 7, surely these words, in conjunction with the jurors' modest damages award, signal that they carefully assessed the evidence presented and concluded, as they expressly stated, that the guards acted in a manner "repugnant to the conscience of mankind." I fear that, in its dismissal of the jury's words, the majority forgets that it is juries, and not courts, who are charged with expressing the conscience of the community. *See Jones v. United States*, 527 U.S. 373, 382 (1999) ("[I]n a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'") (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J. dissenting) ("[P]unitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.").

In sum, Jackson offered more than sufficient evidence to satisfy the objective component of his excessive force claim.

V.

The evidence is equally clear that Jackson satisfied the subjective component; i.e., he offered abundant evidence that the correctional officers applied force "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 473 U.S. at 320-21.

In determining whether prison officials have acted "maliciously and sadistically" a court should balance: (i) the need for the application of force, (ii) the relationship between that need and the amount of force used, (iii) the threat reasonably perceived by the responsible officials, and

(iv) any efforts made to temper the severity of a forceful response. See *Hudson*, 503 U.S. at 7 (citing *Whitley*, 475 U.S. at 321-22). The absence of serious injury is also a relevant, but not dispositive, factor to be considered in the subjective analysis. *Id.*

With respect to the first *Whitley* factor, the need to use force, the jury unquestionably could have concluded that the officers did not need to confine Jackson to the Pink Room in unduly tight three-point restraints, without clothing, bedding, a toilet or even the opportunity to properly clean off the pepper spray, for nearly two days. No doubt, in certain situations, pepper spray, isolation confinement, and three-point restraints can serve valid penological purposes. But the officers have not even offered a justification for the prolonged use of all three of these tools in this case, or for the manner in which they were used.

The record evidence reveals that when the Response Team arrived at Jackson's cell, he was calm; any disturbance caused by Jackson's earlier disruptive behavior had clearly ceased. Even if Jackson initially disobeyed orders to submit to a search (and we are bound to credit Jackson's testimony that he did not), it is undisputed that Jackson complied with these orders as quickly as he could after being sprayed, given the disorienting effects of the pepper spray. By the time Jackson was placed in the Pink Room, he was not a danger to himself or the officers. He did not possess any weapons or contraband -- the officers knew this because Jackson had just submitted to two body searches -- and he was rendered helpless by the pepper spray. Given this, a reasonable jury could easily have found that extended isolation confinement without the opportunity to wash off the pepper spray was unnecessary. But, even assuming that it was necessary to transfer Jackson to the Pink Room, the officers have offered no justification for the prolonged use of the painfully tight

restraints. Thus, a reasonable jury could certainly have concluded that the prolonged use of in-cell shackles were unnecessary.

The second *Whitley* factor, the relationship between the need for the force and the amount of force used, is closely related to the first factor. As stated above, while Jackson's intransigence might have justified the use of some force, the evidence supports a finding that the amount of force used in this case was grossly disproportionate to the need. By the time the Response Team arrived at Jackson's cell, he was calm and had ceased to cause a disturbance. Nonetheless, the officers sprayed him with twelve bursts of pepper spray. After that, Jackson was nearly helpless and complied with all of the officers' orders. Nonetheless, the officers painfully restrained him and placed him in the Pink Room for an extended period of time, without clothing or an opportunity to wash off the pepper spray. Given that the Pink Room is designed to allow an inmate creating a disturbance an opportunity to "cool off," and Jackson was calm for the first seventeen hours of his forty-four hour confinement, there was no justification for keeping Jackson in the Pink Room for such an extended period.

With respect to the third *Whitley* factor, the jury certainly could have found that the officers did not "reasonably perceive" that Jackson posed any threat to their safety that would require them to use this amount of force. As stated above, at the time of the incident, the officers knew that Jackson did not possess any contraband, or anything that could be used as a weapon, because they had just subjected him to a cell and body search. Even if the officers needed to place Jackson in restraints while transporting him to the Pink Room for a limited cooling-off period, there was no evidence of any threat justifying the officers' excessive response. In fact, the prison's own policy states that in-cell restraints are

only to be used when an inmate poses a threat to himself or others, and the officers offered no evidence that Jackson posed any such danger here.

As to the fourth *Whitley* factor -- the officers' effort to temper the severity of their response -- it appears that no such effort was made in this case. The officers persisted in using force against Jackson -- including Officer Fenton's unwarranted blow to Jackson's head -- even after he was incapacitated by the pepper spray and had complied with all orders. Moreover, even though Jackson was calm during his confinement in the Pink Room, the officers kept him there, in restraints, for nearly two days. Both of these facts indicate that the officers failed to temper their response to accord with the situation.

In short, reviewing the evidence, as we must, with the appropriate deference to the jury's factual findings, each of the four Whitley factors weighs in favor of Jackson.[4] Given the officers' unjustifiable use of force and excessively punitive measures, it was certainly reasonable for the jury to conclude that they acted both maliciously and sadistically in confining Jackson to the Pink Room in these conditions for a period of nearly two days.

VI.

For the reasons set forth above, I believe that there was a "legally sufficient evidentiary basis for a reasonable jury" to

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[4]Although it is true, as the majority notes, that courts should afford deference to prison officials, *see ante* at 5, particularly where the initial application of force is a "good faith effort to maintain discipline," it is equally true that courts must not allow such deference to "insulate from review actions taken in bad faith for no legitimate purpose." *Whitley*, 475 U.S. at 322. Where, as here, prison officials' actions lack a legitimate purpose, it is reasonable to infer, that those actions constitute wanton punishment.

decide that the officers' actions constituted excessive force in violation of the Eighth Amendment. Fed. R. Civ. P. 50(a)(1); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000). Accordingly, I respectfully dissent from the majority's holding to the contrary.[5]

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[5]The officers assert that even if they used excessive force in confining Jackson to the Pink Room, they are entitled to qualified immunity because, at that time, it was not clearly established that the level of force used in this case was excessive. "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603,

609 (1999). "Clearly established for the purposes of qualified immunity means that the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 614-15. At the time of the events at issue in this case, it was "clearly established" that the wanton infliction of pain on an inmate without penological justification constitutes cruel and unusual punishment. *See Whitley*, 475 U.S. at 319 ("[T]he unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment . . . ."). Abundant and virtually uncontroverted evidence demonstrated that, after failing to decontaminate Jackson properly from the effects of the pepper spray, the officers confined him to the Pink Room for a period of two days -- shackled the entire time in painful three-point restraints -- and that they took these actions even though Jackson posed no danger to himself or others and was calm for the first seventeen hours of his confinement. In doing so, the officers "unnecessar[ily] and wanton[ly] inflict[ed] . . . pain," an act which the Supreme Court held more than a dozen years ago is "forbidden by the Eighth Amendment." *Id.* Qualified immunity offers no escape for those who engage in such conduct.

JUDGMENT

FILED: September 24, 2001

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-6129
CA-95-271-WMN

QUINTEN X. JACKSON

Plaintiff - Appellee

v.

LAMONT A. MORGAN, Correctional Officer; STANLEY LOCKLEAR, Lieutenant; GREGORY MADDOX, Sergeant; KEVIN FENTON, Corporal; ROBERT HICKS; MAARUFU AULU; ERIK NELSON

Defendants - Appellants

and

STEVEN HARLEE; HOWARD GRANT; RICHARD LANHAM; EUGENE NUTH; T. CARTER, Sergeant; R. PARKER, Corporal

Defendants

Appeal from the United States District Court
for the District of Maryland at Baltimore

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court. The case is hereby remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this court.

/s/ Patricia S. Connor
CLERK

Filed: September 27, 2001

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-6129
(CA-95-271-WMN)

Quinten X. Jackson,

Plaintiff - Appellee,

versus

Lamont A. Morgan, etc., et al.,

Defendants - Appellants.

ORDER

The court amends its opinion filed September 24, 2001, as follows:

On page 2, section 1 -- the section is corrected to begin: "Reversed and remanded by unpublished opinion. Judge Duffy wrote the opinion, in which Chief Judge Wilkinson joined. . . ."

On page 2 -- the opinion is corrected to begin "DUFFY, District Judge."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

QUINTEN JACKSON,	*	
Plaintiff	*	
v.	*	Civil Action No. WMN-95-271 (Magistrate Judge Grimm)
co III HARLEE, et al.,	*	
Defendant	*	

* * * * *

MEMORANDUM

The videotape seen by the Jury showed Seven correctional officers, dressed in riot gear, approach the door of an inmate at Maryland's "Supermax" correctional facility. The inmate, the Plaintiff in this lawsuit, was ordered by the lieutenant in charge to back up to the door of his cell and to place his hands through the food-tray door so that he could be handcuffed. He refused. Within minutes, 12 bursts of pepper spray were fired into the Plaintiff's cell, from the food-tray door, as well as the ventilation screen in the rear. The pepper spray achieved its intended result almost immediately. Coughing and choking, the Plaintiff removed his clothing and passed it out the food-tray door to the correctional officers, then submitted to being handcuffed. His cell door was opened, and he emerged--disoriented, incoherent, talking in "tongues", his face contorted by the burning of the pepper in his eyes, nose, lungs and on his

skin, his eyes tearing copiously. Immediately he was placed in "three piece" restraints--handcuffs around his wrists which were then chained to his waist, to prevent him from raising his hands, and leg irons. He then was escorted by the seven correctional officers away from his cell to the medical area, adjacent to the "pink room", an isolation confinement cell used for disruptive inmates.

While being escorted to the medical facility, completely restrained and still disoriented and incoherent, the videotape showed[1] that one of the correctional officers, Corporal Kevin Fenton, reached forward from behind the Plaintiff, where he could not be seen, and, without provocation, struck the Plaintiff on the head. At the medical facility, the Plaintiff was escorted to a sink, where a nurse briefly wiped at his face and head with wet paper towels, and he was allowed to rinse his head with water, but not shower. After this short stop, he was taken by the correctional officers to the "pink room", an isolation cell containing no mattress, no toilet, and no sink. Wearing only his underwear shorts, despite the fact that it was January, and three piece restraints, and still visibly suffering from the effects of the pepper spray which persisted despite the nurse's momentary toweling, the Plaintiff was placed in the pink room, where he remained for nearly 44 hours.

At the conclusion of the case, the Jury returned its verdict against the seven correctional officers, the Defendants, and in favor of the Plaintiff on one of his Eighth Amendment claims. It awarded him $1.00 in compensatory damages, and a total of $9,500.00 in punitive damages. After announcing the verdict, the foreperson asked to read aloud a statement that the Jury had unanimously prepared. Addressing the Defendants, she read the following statement,

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[1]This segment, difficult to see in "real time" speed, is clear when the tape is played in slow motion, as was done several times during trial.

quoted in its entirety, in a quiet but clear voice, which deserves to be heard beyond the confines of that courtroom:

> We the jury in the matter of Quinten X Jackson v. CO III Harlee, et al[.,] wish to enter the following statement into the record.
> We find that the conditions existing at the Maryland Correctional Adjustment Center, in particular, the isolation cell known as the 'pink room', violate the [E]ighth. [A]mendment rights of prisiner [sic] occupants. Specifically we regard the conditions inflicted upon the prisiners [sic] of "a sort repugnant to the conscience of mankind." Although we find that some of the responsibility for the use of the pink room, to inflict cruel & unusual punishment lays with the defendants, the higher levels of management including Cptn Pugese, the assistant warden, the warden & the Department of Correction bare [sic] the major responsibility.
> We urge the cessation of the use of the 'pink room' while its conditions violate the [E]ighth [A]mendment.
> In the course of this trial, a gratuitous battery inflicted by Cpl Fenton upon Quinten Jackson was revealed to this jury & the court. Although we do not find that it rises to a level that deprived Mr. Jackson of his constitutional rights, we as citizens find it abhorrent [sic].
> We urge that appropriate disciplinary action should be taken against Cpl Fenton & to those other offices [sic] who did not report and covered up for his agregious [sic] actions.

(See Ex. 1 to this Memorandum and Order.) From that jury verdict Rule 50(b) motions have been filed.[2]

Before the Court is Defendants' Motion for Judgment (Paper No. 85); Plaintiff's Opposition to Defendants' Motion for Judgment (Paper No. 89); and Plaintiff's Motion for Judgment and in the Alternative, Motion for New Trial (Paper No. 88). No hearing is necessary. Local Rule 105.6. For the reasons discussed below, both Motions are denied and the Jury's verdict is upheld.

BACKGROUND

This action focused on three issues: was the Defendants, use of pepper spray against the Plaintiff, then an inmate at Maryland's Supermax correctional facility, on January 11, 1994, excessive force in violation of the Eighth Amendment; was the placing of the Plaintiff in full restraints in isolation (in the "pink room" and the "cadre cell") in January, May and October of 1994 excessive force in violation of the Eighth Amendment; and was the Plaintiff denied his due process rights in connection with being placed in isolation in January, May and October of 1994. During the trial, the Court granted the Defendants' Motion for Judgment regarding the Eighth Amendment claims for being placed in isolation in full restraints in May and October, 1994. The Court also granted the Defendants' Motion for Judgment regarding all the due process claims. Additionally, the Court granted the Defendants' Motion for Judgment for all Defendants sued on the basis of supervisor liability [Commissioner Richard Lanham, Warden Sewalll Smith, Warden Eugene Nuth and Assistant Warden Joseph Wilson]. Therefore, only two issues regarding seven defendants [Lt. Stanley Locklear, Sgt. Gregory Maddox, Cpl. Kevin

[2] This case was tried by me before a jury by consent of the parties, pursuant to 28 U.S.C. § 636(c) and Local Rule 301.

Fenton, Officer Robert Hicks, Lt. Maarufu Aulu, Officer Lamont Morgan and Officer Erik Nelson] went to the jury: was the January 11, 1994 use of pepper spray excessive force in violation of the Eighth Amendment and was the January 11 through 13, 1994, confinement to isolation (the pink room) in three-piece restraints following exposure to pepper spray excessive force in violation of the Eighth Amendment.

On October 4, 1999, the Jury found that the January 11 through 13, 1994, confinement in three piece restraints to the pink room was excessive force and therefore violated the Eighth Amendment. The Jury, however, found that the January 11, 1994, use of pepper spray was not excessive force, and therefore concluded that this incident did not violate the Eighth Amendment. As noted, the Jury awarded the Plaintiff $1.00 in compensatory damages and a total of $9,500.00 in punitive damages.

DISCUSSION

In ruling on a motion for judgment as a matter of law (JAML) pursuant to Fed. R. Civ. P. 50(b), a court must consider the record as a whole, viewing the evidence presented in the light most favorable to the party against whom the motion is made. See PPM Am., Inc. v. Marriott Corp., 875 F. Supp 289, 293 (D. Md. 1995). A JAML should be entered if insufficient evidence was presented to support a verdict for the non-moving party. Id. The trial court must determine whether the evidence produced at trial was sufficient to permit a Jury reasonably to return a verdict for the non-moving party, giving the benefit of every reasonable inference to the non-moving party. Sales v. Grant, 158 F.3d 768, 775 (4th Cir. 1998). However, the court may not weigh the evidence or judge the credibility of the witnesses, but must grant the Rule 50(b) motion if the only conclusion a reasonable jury could draw favors the moving

party. Id.; see also De Jarnette v. Corning, 133 F.3d 293, 297 (4th Cir. 1998); Business Dev. Corp. of North Carolina v. United States, 428 F.2d 451, 453 (4th Cir. 1970) (even though resolution of inferences must be left to the jury, it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests upon mere speculation and conjecture).

The Defendants in the present case argue that as a matter of law there is insufficient evidence to support the Jury's conclusion that the placing of the Plaintiff in the pink room in three-piece restraints after being sprayed with pepper mace was cruel and unusual punishment. "Eighth Amendment analysis necessitates inquiry as to whether the prison officials acted with a sufficiently culpable state of mind (subjective component) and whether the deprivation suffered or injury inflicted on the inmate was sufficiently serious (objective component)." Williams v. Benjamin, 77 F.3d 756, 761 (4th Cir. 1996). The Defendants contend that the evidence presented by the Plaintiff was insufficient to support either component of this analysis.

When an inmate claims that prison officials have used excessive force, he or she must establish that the officials applied the force "maliciously and sadistically for the very purpose of causing harm" to satisfy the subjective component of the analysis. Williams, 77 F.3d at 761 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The Supreme Court has established four factors to determine whether prison officials have acted maliciously and sadistically: (1) "the need for application of force," (2) "the relationship between that need and the amount of force used," (3) "the threat 'reasonably perceived by the responsible officials,'" and (4) "'any efforts made to temper the severity of a forceful response.'" Hudson v. McMillian, 503 U.S. 1, 7 (1992) (quoting Whitley v. Albers, 475 U.S.

312, 321 (1986)). Considering these factors in conjunction with the evidence presented at trial, the Plaintiff established sufficient evidence that the Defendants acted maliciously and sadistically. The Plaintiff provided sufficient evidence upon which a reasonable jury could rely to support the conclusion that he did not pose a reasonable threat at the time he was placed in the pink room. This incident began when the Plaintiff resisted the search of his cell. By the time he was placed in isolation, his cell had been searched and no contraband was found. Also, the videotape showed that, while his demeanor at the time he was placed in the pink room was agitated and incoherent following the application of 12 bursts of disabling pepper spray, the prison guards were in complete control the entire time. Warden Smith's statement on cross-examination that there was no property in the pink room that needed to be protected from the Plaintiff supported the Plaintiff's contention that three-piece restraints were not necessary. Further, the notations regarding the periodic observations of the Plaintiff while he was in the pink room contained in a record maintained by the Defendants were sufficient to support a conclusion by the Jury that the duration of the Plaintiff's confinement in the pink room in three-piece restraints in only his underwear, during the winter, was excessive and purposefully punitive. This evidence, coupled with the videotape, which graphically depicted the disabling effect of the pepper spray, as well as the assault by one of the correction officers (Cpl. Fenton) on the Plaintiff as he was being escorted to the medical facility, and the indifferent and obviously ineffective measures used to decontaminate the Plaintiff from the effects of the pepper spray, were sufficient to support the Jury's conclusion that there was no need for the force used, the force used was out of proportion in comparison to the amount of force which would have been appropriate and that the prison officials could not have reasonably perceived that the Plaintiff posed a threat. Additionally, the Plaintiff presented evidence that

the Defendants did not follow their own regulations regarding the use of pepper spray, three-piece restraints and isolation confinement, supporting the conclusion that the prison officials did not make a sufficient effort to tempter [sic] the severity of their response. Therefore, the Plaintiff presented evidence, which in light of the factors outlined in Whitley v. Albers, 475, U.S. 312, 321 (1986), and viewed in the light most favorable to the Plaintiff, supported the Jury's conclusion that the actions of the prison officials against the Plaintiff were "maliciously and sadistically for the very purpose of causing harm." Id.

The objective component of the Eighth Amendment analysis requires that deprivation or injury inflicted upon an inmate be sufficiently serious. To maintain a claim under the Eighth Amendment, the injury caused by the excessive force of the prison official must be more than "de minimis". See Hudson, 503 U.S. at 9; see also Taylor v. McDuffie, 155 F.3d 479, 484 (4th Cir. 1998). However, "the objective component can be met by 'pain itself' even if an inmate has no 'enduring injury'." Williams, 77 F.3d at 762 (quoting Norman v. Taylor, 25 F.3d 1259, 1263 n.4 (4th Cir. 1994)). In the present case, the Plaintiff introduced sufficient evidence to support a finding that he suffered more than a "de minimis" injury. Indeed, the Plaintiff's testimony was corroborated by the testimony of his use of force expert, the Defendant's use of force expert (on the pain and disability caused by pepper spray) and graphically demonstrated by the videotape of the whole incident. The videotape showed the clearly insufficient medical treatment the Plaintiff received after being maced with 12 bursts of pepper spray before being placed in the pink room for nearly 44 hours. This was more than sufficient evidence to support a conclusion by a reasonable jury that he suffered more than constitutionally negligible pain. A reasonable jury could have concluded that the Plaintiff was in considerable pain throughout his time in

the pink room due to the obvious failure to decontaminate him effectively from the pepper spray. Finally, a prisoner can maintain an Eighth Amendment excessive force claim even if he or she only suffered "de minimis" injury if there were extraordinary circumstances. See Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994) (citing Hudson v. McMillian, 503 U.S. 1 (1992)). A prisoner can maintain an Eighth Amendment excessive force claim if the force used was the type "repugnant to the conscience of mankind." Id. As discussed, the Jury did conclude that the force used against the Plaintiff was repugnant to mankind, as evidenced by the fact that after delivering their verdict, they took the extraordinary measure of reading a public statement regarding their feelings about the Defendants' conduct. Thus, there is sufficient evidence to support the Jury's conclusion that the force used met the objective component of an Eighth Amendment excessive force claim.

In looking at all the circumstances, the Plaintiff provided sufficient evidence to support the Jury's conclusion.[3] The sufficiency of the evidence is exemplified

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[3] This case is very similar to Williams, 77 F.3d 756, in which the Fourth Circuit remanded an excessive force claim to be decided by a jury. In both cases a prisoner was placed in isolation in restraints shortly after being exposed to a chemical agent. In both cases, there were allegations that the prisoner had not received proper medical care after being exposed to a chemical agent but before being placed in isolation.

The Defendants have insisted throughout this case that courts in this district have consistently ruled, "as a matter of law" that the use of restraints on inmates, and their confinement in the pink room, do not rise to level of excessive force. First, this is wrong, see Chase v. Sgt. Jones. et al., Civil No. CCB-96-1287 (D. Md. Sept. 28, 1999), a recent decision by Judge Catherine Blake denying summary judgment on Eighth Amendment excessive force claims brought by a plaintiff who was placed in the pink room in restraints. Second, the unpublished slip opinions cited by the Defendants did not involve a combination of chemical agents, restraints and isolation to the degree that this case

by the statement read by the Jury at the conclusion of the case. (See Ex. 1 to this Memorandum and Order.) The Jury stated that they found that the conditions inflicted upon the Plaintiff, in particular being placed in the pink room, were the type which were "repugnant to the conscience of mankind." (Id.) This statement demonstrates that the Jury understood the type of action required to find that excessive force was used against the Plaintiff. See Norman, 25 F.3d at 1264 Fn.4 (quoting Hudson v. McMillian, 503 U.S. I (1992)) (noting that force which is "repugnant to the conscience of mankind" is in violation of the Eighth Amendment regardless of the injury caused). The Jury's statement also revealed that they concluded that Corporal Fenton purposefully hit the Plaintiff in the head during this incident. The Jury's comments about this incident indicated that they concluded that this action met the subjective component of an excessive force claim but failed to meet the objective component because there was no evidence to establish that this unprovoked assault caused more than a "de minimis" injury. The Jury's statement establishes that they clearly understood and properly applied the two part analysis for determining whether excessive force was used. They condemned the gratuitous and malicious application of force by Corporal Fenton against a then disorientated, incoherent, and completely restrained inmate, even as they recognized that it did not rise to the level of cruel and unusual punishment. Having dutifully discharged their responsibilities as jurors, they then spoke out as ordinary citizens, simply and sincerely. Against this backdrop, to

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presented and therefore, are easily distinguishable. It is the combination of all these events which inflicted excessive force on the Plaintiff and it was the combination of all these events which troubled the Fourth Circuit in the Williams case. Id. at 765 (citing United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990) (noting that "the unnecessary infliction of continued pain throughout a prolonged time period clearly supports an inference that the guards were acting to punish, rather than to quell the disturbance").

suggest that the Jury did not properly weight the evidence and follow the instruction of law is untenable. Therefore, the Jury's conclusion that the Defendants used excessive force in violation of the Plaintiff's Eighth Amendment rights when they placed him in the pink room in three piece restraints without adequate decontamination from the pepper spray is upheld.

The Defendants argue that even if there was a use of excessive force, they are entitled to qualified immunity. Government officials are entitled to qualified immunity when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Winfield v. Bass, 106 F.3d 525, 530 (4th Cir. 1997). The right to be free from the use of excessive force is a clearly established right. See Whitley, 475 U.S. 312; see also Finnecan v. Fountain, 915 F.2d 817, 823 (2nd Cir. 1990) (citing Anderson v. Creighton, 483 U.S. 635, 640-41 (1987)) (noting that "the right of an individual not to be subjected to excessive force is 'clearly established' in the conventional sense"). However,

> to say that the use of constitutionally excessive force violates a clearly established right . . . begs the open question whether the particular degree of force under the particular circumstances was excessive . . . . [T]he facts and circumstances of each case must be examined to determine whether the contours of the right . . . [are] sufficiently clear that a reasonably [sic] official would understand that what he is doing violates that right . . . .

Id. The contours of the right to be free from excessive force have long been sufficiently developed such that prison officials are aware that they cannot use force without justification. Indeed, as the Department of Corrections and Supermax regulations which were introduced into evidence in this case amply demonstrate, in every situation in which prison officials use force, they know that unless there is a sufficient justification for that force, their actions are subject to scrutiny under the Eighth Amendment. The factors outlined by the Supreme Court in Whitley, 475 U.S. at 320-21, for evaluating the subjective component of an excessive force claim establish the type of justifications required for the use of force. Any prison official who uses force against an inmate knows that his or her actions will be evaluated in light of these factors. Therefore, this case is not about whether or not the use of the pink room or three piece restraints is in every case a use excessive force, but about whether or not there was sufficient justification for the use of force in this case.[4] In this case, the Jury concluded that the prison officials did not have sufficient justification for the force they used in light of these Whitley factors. The Defendants knew, or reasonably should have known, that they would be held liable for any use of force that a jury

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[4] The fact that the use of the pink room, pepper spray or three piece restraint has sometimes been found to be justified does not provide the Defendants with qualified immunity. The specific actions in question need not have been held unlawful to overcome an official's qualified immunity. See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985)) (noting that officials are not protected by qualified immunity simply because the very action in question has not previously been held unlawful); see also Gutierrez v. City of San Antonio, 139 F.3d 441, 445 (5th Cir. 1998) (holding that two police officers were not entitled to qualified immunity as a matter of law even though action they were accused of, hog-tying an arrestee, had never specifically been found to constitute excessive force).

concluded was not justified. Therefore, the Defendants are not entitled to qualified immunity.

The Defendants also objected to the award of punitive damages. The Defendants noted that while the Jury answered in the affirmative the question on the verdict sheet regarding whether the Plaintiff had proved by a preponderance that the Defendants acted with malicious or callous disregard for the Plaintiff's constitutional rights, they answered negatively the question on the verdict sheet regarding whether the Plaintiff had proven by clear and convincing evidence that the Defendants acted with malice. While the Supreme court has not specifically addressed this issue, preponderance of the evidence appears to be the federal burden of proof standard for awarding punitive damages under § 1983.[6] See Cooper v. Dyke, 814 F.2d 941, 948 (4th Cir. 1987) (citing Smith v. Wade, 461 U.S. 30, 51-55 (1983)) (noting that the standard for assessing punitive damages under section 1983 is not higher than the standard for determining liability); see also 1 SHELDON H. NAHMOND, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 § 4:41, at 4-109, 4-110 (4th ed. 1997) (citing Nelson v. Emerald People's Utility District, 318 Or. 99, (1993)). It is sufficient that the Jury found the evidence supported a punitive damages award by a preponderance of the evidence. Therefore, the Defendants' Motion for Judgment is denied.

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[6]The Defendants noted that under Maryland Law the standard for awarding punitive damages is "clear and convincing evidence." However, a cause of action brought under section 1983 is a federal cause of action and therefore, federal standards govern determination of punitive damages. See Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986); see also Jackson v. Pool Mortg. Co., 868 F.2d 1178, 1181 (10th Cir. 1989).

The Plaintiff has also filed a motion for judgment as a matter of law, alleging that based on the evidence at trial no reasonable jury could have found that the Defendants did not use excessive force in violation of the Eighth Amendment when they sprayed the Plaintiff with pepper spray on January 11, 1994. The two-part analysis outlined above, see Williams, 77 F.3d at 761, is also the appropriate method for determining if the evidence at trial was so overwhelming that 'no reasonable jury could conclude that the Plaintiff was not exposed to excessive force when he was maced with pepper spray. As discussed above, the Jury's post verdict statement to the Court demonstrates that they properly and clearly understood this two-part analysis. The Jury recognized that the Plaintiff was not without fault. There was testimony that he failed to follow the direct orders of the prison officials on several occasions. The videotape also established that he refused to cooperate with the prison officials' efforts to search his cell until after he was maced with pepper spray. This is sufficient evidence to allow a reasonable jury to conclude that the initial use of pepper spray was reasonably related to a threat reasonably perceived by the prison guards. Therefore, a reasonable jury could conclude that this event did not meet the subjective component of the analysis and find that it was not a use of excessive force. The Plaintiff's motion for judgment is therefore denied.

CONCLUSION

The Defendants failed to establish that evidence presented at trial was insufficient to support the Jury's verdict that the Defendants used excessive force when they placed the Plaintiff in three piece restraints in the pink room. Therefore, the Defendants' motion for judgment is denied. Additionally, the Plaintiff failed to establish that a reasonable jury could not have found that the Defendants did not use

excessive force when they maced the Plaintiff with pepper spray. Therefore, the Plaintiff's motion for judgment also is denied. The Jury's verdict on October 4, 1999, of a judgment against the Defendants in the amount of $9,501.00 is upheld. A separate order shall issue in conformity with this Memorandum.

Dated: 12/20/99

/s/ Paul W. Grimm
United States Magistrate Judge

EXHIBIT 1

We the jury in the matter of Quinten X Jackson vs CO III Harlee, et al wish to enter the following statement into the record.

We find that the conditions existing at the Maryland Correctional Adjustment Center, in particular, the isolation cell known as the 'pink room', violate the eighth. amendment rights of prisonor occupants. Specifically we regard the conditions inflicted upon the prisonors of "a sort repugnant to the conscience of mankind. Although we find that some of the responsibility for the use of the pink room, to inflict cruel & unusual punishment lays with the defendants, the higher levels of management including Cptn Pugese, the assistant warden, the warden & the Department of Correction bare the major responsibility.

We urge the cessation of the use of the 'pink room' while its conditions violate the eighth amendment.

In the course of this trial, a gratuitous battery inflicted by Cpl Fenton upon Quinten Jackson was revealed to this jury & the court. Although we do not find that it rises to a level that deprived Mr. Jackson of his constitutional rights, we as citizens find it abhorent.

We urge that appropriate disciplinary action should be taken against Cpl Fenton & to those other officers who did not report and covered up for his agregious actions.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 23, 2001

No. 00-6129
CA-95-271-WMN

QUINTEN X. JACKSON

Plaintiff - Appellee

v.

LAMONT A. MORGAN, Correctional Officer; STANLEY LOCKLEAR, Lieutenant; GREGORY MADDOX, Sergeant; KEVIN FENTON, Corporal; ROBERT HICKS; MAARUFU AULU; ERIK NELSON

Defendants - Appellants

and

STEVEN HARLEE; HOWARD GRANT; RICHARD LANHAM; EUGENE NUTH; T. CARTER, Sergeant; R. PARKER, Corporal

Defendants

On Petition for Rehearing and Rehearing En Banc

The Appellee Quinten X. Jackson's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

United States Constitution, Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

42 U.S.C. 1983 (1982)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.